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THE CONSTITUTIONAL CLAUSES OF MAGNA CARTA.

IN MODERN times there has been a general disposition to antedate beyond all seeming the rise of free institutions in the history of the Anglo-Saxon race. Even so conservative a scholar as Stubbs finds that our ancestors were wedded to the practice of democracy, while they were still skin-clad nomads in the forests of northern Europe, and the same writer dates elective representation from the reign of Edgar. But nowhere has this antedating tendency appeared more strongly and universally than in the interpretation of Magna Carta.

Around that historic document, a wealth of tradition has gathered. Those who forced it upon the King have been regarded as a band of patriots, seeking only to safeguard constitutional liberty against the encroachments of royal despotism. Its provisions are usually supposed to vie with those of the Declaration of Independence in constituting the most powerful assertion of popular liberties in the face of tyranny and oppression that has been made in the entire history of the race. Hallam calls it "The keystone of English liberty." Other writers are equally enthusiastic. "All the objects for which men naturally wish to live in a state of society were settled in its various articles." (De Lolme, Const. of Eng. 276.) "The whole of the constitutional history of England is little more than a commentary upon Magna Carta." (1 Stubbs, Const. Hist. of Eng. 532.) "The great act at Runnymede was in the fullest sense of the term a national act, and not the mere act of the baronage in behalf of their special privileges." (1 Taylor, Origin and

Growth of Eng. Const. 380.) Just what Magna Carta is popularly supposed to have gained for individual liberty is well summed up in the following from Creasy (Hist. of Eng. Const. 178) :

- “(1) The government of the country by an hereditary sovereign, ruling with limited powers, and bound to summon and consult a parliament of the whole realm, comprising hereditary peers and elective representatives of the commons;
- “(2) That without the sanction of parliament no tax of any kind can be imposed, and no law can be made, repealed or altered;
- “(3) Trial by jury;
- “(4) That justice shall not be sold or delayed.”

It is intended in the present paper, first, to make some inquiry into the historical setting of Magna Carta; second, to examine the constitutional clauses of the Charter and decide to what extent they will bear the construction commonly put upon them; and third, to attempt some conclusion as to the actual influence which the Charter has exerted in the rise of constitutional government.

It is a notorious fact that on June 15, 1215, John, King of England, with a very poor grace and for no better reason than that he could not help himself, affixed his seal to a certain document, which has since been known by the famous name of Magna Carta. It is equally well known that the granting of this Charter was the outcome of a struggle between the party of the King upon the one hand, and the feudal baronage upon the other.

A true comprehension of the terms and intent of the Charter itself, then, can hardly be hoped for, unless the main issue in this struggle is first correctly understood. As a matter of fact, the aims of the barons have in modern times been frequently misconceived, and considerable undue eloquence has been lavished upon the disinterested character of their motives. It must be remembered that in the year 1215 the English State was in a very real sense feudal. Now it can be asserted, without fear of successful contradiction, that history affords not a single in-

stance of any class in a feudal State putting forth an effort to remove the political disabilities of the classes beneath it. The feudal system was constructed upon a framework of rigidly separate castes like those of India at the present day, and between these castes was a great gulf fixed of special privilege. Class-privilege and class-selfishness were the very essence of it, and individual liberty was its exact contradictory. Feudal government was government by right of class, irrespective of the consent of the governed; constitutional government is government by the express consent of the governed; clearly these two forms are as far removed in principle as the poles. Consequently, if the baronage in the year 1215 were attacking special privilege, they were storming their own citadel.

What, then, was the real point at issue in the conflict? This question can be briefly and clearly answered. What the barons wanted was a surer right to dictate to the Crown in matters of government, and Magna Carta is the record of the measures which they took to secure that right. This really amounts to a question of the personnel of the King's council, or, to use the contemporary term, the *curia regis*. The *curia regis* of the time united in itself without differentiation the executive, legislative, and judicial branches of government, and hence those who sat in it were the rulers of England and of all the other possessions of the British Crown.

Now the *curia regis* consisted of two elements: first, the baronage or tenants *in capite* of the Crown. These sat by virtue of their "right" (Baldwin, *The King's Council*, *passim*) to do so, on the feudal principle that a vassal should give "aid and counsel" to his lord, and met only on fixed and comparatively rare occasions. In practice only the great lords ("*majores barones*") attended. To the simple knights and squires attendance was both burdensome and bootless, and hence they habitually absented themselves. The second element was composed of the King's chosen officials and ministers, and these sat more continuously, and by command, not by "right." Furthermore, these were usually not tenants *in capite*, since the King would want for these positions men upon whom he could rely absolutely, whose private interests would not lead counter to their

duty to him. Hence these officials were usually priests, clerks or foreigners—persons not possessed of great private interests in England. This second element dated only from the reign of Henry II.

As would be expected, considerable jealousy of these newcomers soon arose on the part of the baronage, a jealousy which became the greater and the more freely expressed as it grew more and more evident that the government of England was tending to change from an aristocracy to a bureaucracy. Accordingly, it is from this time that we first hear talk of “evil counselors,” “foreign-born ministers,” and “favorites.” These epithets were merely terms applied by the party of *right*—the great vassals—to the party of *command*—the bureaucracy. Two examples out of many must suffice.

Matt. Paris 231 (A. D. 1211): “Habuit autem rex hac interdicti tempestate consiliarios iniquissimos, quorum nomina pro parte hic ponere non omissam, etc.”

Those whom the worthy Matthew, a stout baronial partisan, enumerates were all royal officials and men of obscure or foreign origin; for example, Godfrey Fitzhugh, the justiciar; Richard Marshall, the chancellor; Peter des Roches, bishop of Winchester; etc.

Ann. Waverl. 283 (A. D. 1215): “Applicuerunt in Anglia alienigenae barbari et magna multitudo diversarum linguarum errorem regis pertinaciter confoventes.”

It will be noticed that the good chronicler in this case has suffered his *animus* against the King to lead him into unreasonably harsh language, for these “barbari” came from France, which at the time was considerably more highly civilized than England. Indeed it may be observed in passing that much of the bad odor of King John with posterity has been owing to the fact that all the chronicles of the time were written by priests and monks, to whom, of course, a King who had defied the Pope and confiscated the possessions of Holy Church was *anathema*.

So here are the lists set: on the one side, the feudal tenants *in capite* struggling to secure and extend their “right” to con-

trol the membership of the *curia regis*, and hence to control the government; on the other, the Crown with its bureaucracy of officials, struggling to maintain its power above that of the feudatories. Magna Carta marks only the first skirmish in this battle—a battle which the baronage often won, as often throwing away their victory by slackness in attending the council, and which did not reach ultimate decision until the days of the Tudors. But the point of greatest importance in the present connection is that these two were the only parties to the struggle. The great mass of the people were neither concerned nor considered.

The great Charter having been thus considered as a sign of the times, it now remains to examine its constitutional clauses and construe them in the light of the views just expressed. The clauses which have been supposed to guaranty the essentials of constitutional liberty are four in number and run as follows, the number in each case being that of the particular article in the Charter:

“12. Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum, et primogenitum filium nostrum militem faciendum, et ad filiam nostram promogenitam semel mari-tandam, et ad haec non fiat nisi rationabile auxilium.”

“14. Et ad habendum commune consilium regni, de auxilio assidendo aliter quam in tribus casibus prædictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et maiores barones, sigillatim per litteras nostras; et præterea faciemus summoneri in generali, per vicecomites et ballivos nostros, omnes illos qui de nobis tenent in capite.”

“39. Nullus liber homo capiatur, imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terræ.”

“40. Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.”

As was seen in the passage quoted from Creasy, these clauses are supposed to have provided the following: a national assembly partly representative in its nature (cl. 14), no taxation of any kind without the consent of that assembly (cl. 12), trial by jury (cl. 39), and that judicial decisions be not purchasable (cl. 40). These four points will be examined in some detail and, for the sake of convenience, in the reverse of Creasy's order.

"Nulli vendemus, etc." This clause is commonly taken to imply that it had been a practice of the King's courts of law to sell their decisions, and that the successful party to a suit won by the length of his purse rather than by the righteousness of his cause. Hence this clause is supposed to have wrought an important reform by placing rich and poor upon an equality before the royal courts and removing the weight of gold which had been disturbing the balance of the scales of justice.

But there is more here than meets the eye. The royal courts, initiated by Henry II, were the most important and far-reaching, if not the most conspicuous, manifestation of that bureaucracy which has been previously dwelt upon. It must be remembered that before the institution of these courts the law and the administration thereof were entirely local. Each county had its court, and so had each township ("hundred") and each manor; and the law administered in these courts consisted of the "folk-law," called by Maitland "an uncouth tangle of precedent and custom," which might, and generally did, differ from county to county and from hundred to hundred. The manorial court was entirely under the influence of the lord of the manor, the lord himself or his steward always presiding, and furthermore, by the beginning of the thirteenth century this court had practically absorbed the hundred courts. The county courts (*shire-moot*) were presided over by the sheriff (*vicecomes*), who was usually the great lord of the county. So, clearly, the feudal baronage under this system were in efficient control of the administration of justice, and of the prestige and profits arising therefrom.

But a great and, to the baronage, mortifying change in the aspect of judicial affairs dates from the reign of Henry II.

That great constitution-maker set up a system of itinerant judges ("justices of assize") who went regularly on circuit, and to them he annexed the most important part of the extensive jurisdiction formerly possessed by the baronial and local courts. By the grand assize they got jurisdiction in land cases where the parties were military tenants of the Crown, and were in possession. By the three petty assizes—*novel disseisin, morte d'ancestor* and *darrein presentment*—jurisdiction in cases where the parties were not in possession was added. Sole jurisdiction in felony cases was bestowed by the Assize of Clarendon—"vice-comites illos (i. e. *robatores, murdratores, etc.*) ducant ante Justitias" (art. 4). In practice there were various cases in which these royal courts had concurrent jurisdiction with the baronial courts. Finally, the position of these courts was made secure by compelling the attendance of the barons themselves, even though the particular baron might have a court of his own—"nullus remaneat pro libertate aliqua quam habeat vel curia vel soca." (Assize of Clarendon, art. 8.)

The outcome of all this was that the business of the royal courts, and the consequent fees, increased rapidly in volume, while the profits of the local courts were correspondingly entrenched upon. Indeed the advantages afforded by the former were too obvious to remain long unrecognized. The law which they administered was uniform, not mere varying local custom. Their decisions were swift, usually unbiased—since the justice would be a stranger to the parties—and were based upon the best evidence obtainable, as will appear in the discussion of trial by jury.

The natural result, then, was that the baronage viewed the royal courts with much distaste and jealousy, and it is in the light of these feelings that the clause of Magna Carta under consideration must be interpreted. When the barons forced King John to promise "*nulli vendemus, etc.*," they were not referring to presents or gratuities received by the royal justices. Those who have supposed so have been guilty of anachronism by importing into the thirteenth century the sensitive conscience of the seventeenth. It was not until the time of Lord Bacon that the practice of receiving such gratuities on the part of the judges

was checked. The real aim of this clause, then, was to cut off the fat fees of the royal courts in the land cases. Henry II had obliged the barons to come to his courts for justice and to pay for it besides, whereas previously they had given it to themselves in the local courts. They now determined that if they must come to the King's courts, at least they would no longer pay fees. Hence "*nulli vendemus, etc.*," means, "we will no longer charge fees in our courts." So much for clause 40.

The next point to be considered relates to clause 39 and the important question of trial by jury—"Nullus liber homo capiatur, etc., nisi per legale judicium parium suorum." The first question which here arises is: who was a "*liber homo*"? At this point, it is well to preface that there is a very essential difference between the signification of *liber* and *libertas* in monkish Latin and their classical meaning. In monkish Latin a *libertas* was a privilege, possessed specifically by some person or class, from the enjoyment of which other persons or classes were excluded. Accordingly, when Stephen Langton in the year 1213 gave advice to the baronage by which "*libertates diu amissas poteritis ad statum pristinum revocare*" (Matt. Paris, 240), he referred to their privileges as feudal lords, and not to their natural rights as free-born men. Gardiner quotes an apt clause from a municipal petition of about this period in which the town protests against the abolition of its ancient "*libertas*" to put culprits in the stocks. A "*liber homo*," then, was, in general, a person who possessed a *libertas*, or special privilege. In particular, he was a person who held his land on terms of military tenure (*liberum tenementum*), that is, quit of all burdens except the duty to render military service to the Crown when required. This point is made very clear in the third reissue of the Charter (A. D. 1225), in which this clause is changed so as to read, "*Nullus, etc., aut dissaisietur de LIBERO TENEMENTO SUO, etc.*" In other words, the *liberi homines* were the tenants *in capite* of the Crown and a few others who held a *liberum tenementum* by virtue of some special grant or concession. Domesday gives only some 18,000 *liberi homines* out of a total of about 300,000 men reported—about 6 per cent. This percentage decreased, if anything, up to

the time of the “Black Death” in the middle of the fourteenth century.

It is interesting to note in this connection that, although the municipalities were destined to become the birthplace of constitutional government, the *burgenses* (men of corporate towns) were not yet at the time of Magna Carta classified as *liberi*. They were still subject to certain slight, though annoying, services in villeinage, such as *merchet* (fine payable to lord on marriage of daughter), *childwite* (fine on illegitimacy), etc. These were sufficient to cause the townsman’s estate to be held a *villanum tenementum*.

The effect of the foregoing is to show that the benefits of clause 39 were restricted to a numerically insignificant fraction of the population, and that fraction was mostly composed of our old friends the tenants *in capite* of the Crown. The clause gave no protection to tenants *in mesne*, tenants *in socage*, tenants *in franc-almoign*, tenants *in villeinage*, and all the other classes in that queerly complex form of society which we know as feudalism. Consequently, if this clause gave the protection of trial by jury to any class in England, it gave it to that class which needed protection least of all by reason of its being best able to protect itself. But trial by jury is always considered the great bulwark of popular and individual liberty. Hence here is already a strong presumption against this clause of Magna Carta having any reference to trial by jury.

It may be well to sum up just here the result so far reached in the interpretation of this clause. It is as follows: “we will not that any tenant *in capite* suffer arrest, imprisonment, etc., except by the ‘*legale judicium parium suorum*.’” So the question now is in brief this: does “*judicium parium*” mean trial by jury, as contended by Creasy, and others, or does it not? It can be positively replied that “*judicium parium*” does not mean trial by jury, since it is susceptible of proof that no such thing as trial by jury existed in the period under examination, or, for that matter, for fully two centuries thereafter.

In origin, the jury is Frankish. When a Frankish ruler desired information on some particular local matter, for example, the amount of taxes which the locality could pay, he sent his

official there, who gathered several of the local men of known responsible character, put them on their oath to tell the truth, and thus extracted the desired information. By the time of the Conquest, this practice was very general in France, and the Conqueror brought it with him to England. The first recorded example of the use of the jury ("jurati"—men who have taken an oath) in England was in the collection of *data* for compiling the Domesday Book. The introduction of the testimony of this body of sworn men into the courts of law was another of the innovations of Henry II. He directed (Assize of Clarendon, art. 1) that his justices on circuit should inquire in every locality "*per xii legaliores homines de hundredo, et per iv legaliores homines de qualibet villata, per sacramentum quod verum dicent,*" whether there were in that locality any known felons. This jury came to be known as the "jury of presentment," because it "presented" the criminals to the courts, and the modern "grand jury" is its direct descendant. The jury was a few years later introduced by the same ruler into civil cases also by the petty assize of *morte d'ancestor*, in which it was provided that if an heir complained that he was excluded from his due inheritance, the King's justice should take "*percognitionem per duodecim legales homines, qualem saisinam defunctus inde habuit, die qua fuit vivus et mortuus*" (Assize of Northampton, art. 4). These were the only uses of the jury in the courts of law at the time Magna Carta was granted.

Clearly, then, by no straining of language could either of these be called trial by jury. The sole duty of the jury here was to give information to the King's judges regarding the facts of the case, so that the judges could reach a correct decision. In other words, these jurors were chosen *witnesses*, pure and simple. The form of their oath shows clearly enough that their sole office was to testify as to the facts. Following are several statements of the oath, taken from different authorities in this period: "*quod inde veritatem secundum conscientiam suam manifestabunt*" (Constitutions of Clarendon, cap. vi—A. D. 1164); "*quod non falsum inde dicent, nec veritatem tacebunt scienter*" (Glanvil, lib. ii, c. 17—A. D. 1190); "*quod veritatem dicam de hoc quod a me interrogabitis ex parte*

domini regis" (Gneist, quoting from a source not cited); "*pro nihilo omittam, quin veritatem dicam, sic me deus adjuvet et hæc sancta*" (Bracton, lib. 4, c. 19, fol. 184b—A. D. 1250). Glanvil's account is very nearly contemporary, and he describes the process of "afforcing" the jury, that is, weeding out those jurors who had not the requisite knowledge of the facts of the case at bar, "*donec tales inveniantur, qui rei veritatem inde scierint.*" It is not necessary, then, to labor this point further, since it is sufficiently obvious that in no sense had the jurors of the thirteenth century the right to *try* the case, or to pronounce any manner of decision whatever. The decision was given by the King's judges in the light of the *testimony* of the jury. Consequently, the direct and inevitable result is that since the jury could not pronounce a "*judicium*," then "*judicium parium*," whatever it was, was not, and could not possibly have been, trial by jury.

The question as to what "*judicium parium*" actually was is easily enough answered. It is merely the old matter of aristocracy's jealously of bureaucracy. As was previously seen, the ministers of the Crown at this time were usually men of obscure origin, and were not chosen from the numbers of the tenants *in capite*. The baronage felt it as an affront that decisions involving their persons and property should be pronounced by judges belonging to a lower feudal caste. Furthermore, the King's judges, as has been also seen, were apt to be impartial, and were not usually wont to show the noble suitor that special consideration which he would feel that his rank demanded. Indeed the judges may well have returned the jealousy of the aristocrats, and on occasion may have been vindictive. "*Judicium parium*," then, simply meant judgment by members of the same feudal caste.

In brief, then, the meaning of clause 39 is as follows: "The King's justices shall not decide criminal cases where a tenant *in capite* is the defendant, unless said justices be also of baronial rank." This clause is still the law in England, where a peer has the right to demand trial before the House of Lords to this day. But clearly all this is very remote from trial by jury.

The third of the constitutional clauses is clause 12, involving the question of taxation by consent — “*nullum scutagium vel auxilium, etc., nisi per commune consilium regni nostri, etc.*” As has been pointed out, this clause is commonly held to have provided that no tax of any kind be laid without the consent of a parliament, in which sat hereditary peers and elective representatives of the people at large. But it can be shown that no such general provision was intended. The decisive question is as to the meaning of the terms, “*scutagium*” and “*auxilium*.¹”

“*Scutagium*” presents no especial difficulty. It was simply a sum paid by a *liber homo* in commutation of the military service which he owed to the Crown. When the King was about to embark upon a military enterprise of some kind, and lacked the necessary funds, he declared a scutage of so much on the “knight’s fee” (five hides of free-hold land). Every *liber homo* who did not then join the royal forces with all the knights due from his holding, paid this sum for each knight which he failed to furnish. Under Henry II, this method of raising money aroused no especial opposition, since the King was discreet both as to the frequency and the amounts of the scutages which he declared. But under Richard and still more under the chronically penniless John, the scutages advanced steadily both in frequency and in amount, until they were felt as a very real burden and the baronage grew restive, especially since, under John, they were not allowed to exercise their option, and fight instead of paying, if they so preferred. A few instances may be given, showing very clearly the reason why the baronage imposed clause 12 upon King John. In the year 1200, the King exacted a scutage of two marks (26 shillings), when twenty shillings was the most ever exacted before (Rad. Coggeshale, 860); in 1204, he took the still heavier one of two and one-half marks (Matt. Paris, 209); in 1205, he took what the good Matthew calls “*pecuniam infinitam*,” so this one must have been heavier yet (Matt. Paris, 212). Accordingly, it is readily seen why the baronage desired to impose a check upon the taking of scutages. The scutage, then, affected, and could affect, only our old friends, the tenants *in capite*.

What, then, was an “*auxilium?*” Here is another case, such

as has been already observed in the case of the words *liber* and *libertas*, of a variation between the classical and monkish significance of a Latin word. In the Latin of Magna Carta, "*auxilium*" had not the general meaning which it possesses in classical literature, but meant a feudal "aid." Now an "aid" was a contribution in money from a feudal vassal to his lord, and the original principle seems to have been vaguely to the effect that the lord could demand such a contribution at almost any time that he felt himself short of funds. But in England the rule had always been that the "aid" was to be exacted only on occasions of uncommon necessity. Three such occasions had in the course of time come by custom to be universally recognized. These, as specified in the clause under consideration, were ransoming the lord's body from captivity, knighting his eldest son (*pur fere Fitz-Chivaler*), and marrying his eldest daughter once (*pur fille marier*). Hence clause 12 of the Chapter provides, in the light of the explanation just made, that, except for these three specific "aids," the King shall exact no "aid" or scutage from his feudal vassals without the consent of the "*commune consilium regni.*" The examination of the phrase "*commune consilium regni,*" will be reserved until the discussion of clause 14. The point of present importance is that clause 12, like clause 39, applies only to the feudal vassals of the Crown, our familiar friends, the tenants *in capite*, who thus, as we have come to expect, are again found looking out for their own interests, and only for their own.

Consequently, this clause is very far from affording that universal protection against arbitrary taxation, which many have fancied they discerned in it. "No taxation without representation" was a slogan of the seventeenth century, not of the thirteenth. The King might still make exactions from all the castes of the feudal State below the highest. Hence "purveyance," "tallage," "thirteenths," etc., could be levied as before at the King's will. Of these, the case of tallage is especially interesting to modern observers, because it fell upon the towns, whence, as has been previously remarked, constitutional government was destined ultimately to spread to the central administration. Both the amount of this tax and the frequency of its imposition were

matters solely for the royal discretion, and that this continued to be the case after the year 1215 is readily shown by quotations from the chronicles. Thus we read in the Annals of Theokesbury under the year 1225, that "*rex grave tallagium cepit super singulos divites, cives et burgenses.*" Thomas Wykes relates that in the year 1234, "*rex Henricus fecit talliari omnes civitates et burgos per totam Angliam.*" The arbitrary character of tallage is so well illustrated by a passage from Matthew Paris under the year 1243, that leave is taken to quote it in full:

"Cives Londineses ad gravissimam compulsi sunt redemptionem, quae tallagium dicitur, sub hac forma: venerunt exactores ad illum vel illum civem, dicentes, 'Tantam et tantam oportet te pecuniam domino regi pro commoditate regni militanti.' Et secundum voluntatem et aestimationem extortorum pecuniam civium mutilarunt."

Clause 12, then, was purely a baronial provision, and if any further proof were necessary, it would appear in the fact that when the Charter was reissued in 1216, John being dead, and the baronage in undisputed control of affairs, this clause was altogether omitted. It was also omitted from all subsequent reissues until the year 1297, when it appeared in a form essentially different, in the Confirmatio Cartarum. As to the matter of taxation, then, the irresistible conclusion is that Magna Carta was very far from setting up for the nation at large the principle of "no taxation without consent."

There now remains for examination only the question as to whether Magna Carta provided for the sitting of a parliament that should be in any sense representative of the whole nation. An inquiry into the rise of representative government would not enter properly into the present paper, since the time of its rise was subsequent to the period of Magna Carta. It is sufficient here to show that the Charter contains no provision for popular representation. It has already been seen that clause 12 provided that no scutage or "aid" be imposed without the consent of the "*commune consilium regni.*" In clause 14, it is then explained, very plainly and precisely, just who the persons com-

posing this "*commune consilium regni*" were—so plainly and precisely, indeed, that it is difficult to understand how even the wayfaring man, not to mention certain scholars who have written on the subject, could ever have so erred as to mistake it for a representative body. The "*consilium*" is to be composed of "*omnes illos, qui de nobis tenent in capite,*" the "*majores barones*" (great lords) to be summoned by personal letter, the "*minores barones*" (knights and squires) by a general notice of summons addressed to the sheriff of each county. Every man was to attend for himself in his own right; there is no mention of representation. Indeed there was nobody for them to represent. The sole object of the meeting of the *consilium* was to consent to the imposition of scutages and "aids;" and, as has been seen, these taxes fell only upon the tenants *in capite*, all of whom, according to this clause, had the right to attend: Obviously, when all those who were to be taxed by the *consilium* had the right to attend the *consilium*, there was nobody left to be represented.

The fact is that the *consilium* was composed on precisely the same principle as the present House of Lords; it was made up of people who attended because they had a right to do so, and who were representative of no one but themselves. Here, indeed, is our last and most conspicuous illustration of the fundamental division with which this paper began: on the one side the party of "right," on the other the party of "command." The provision made by this clause is exactly what would have been anticipated from the nature of the struggle. "*Commune consilium regni*" was neither more nor less than *curia regis* sitting for a specific purpose. Hence, since Magna Carta marked a baronial victory, and since one of the main efforts of the baronage was to control the membership of the *curia regis*, excluding from it all who were not tenants *in capite*, we should be surprised if the Charter did not contain some sort of exclusion measure. Clause 14 is just that measure, and those who have failed to recognize the fact have missed its essential significance. This clause did not, then, provide for a popular body, or for one in any sense representative of the people. On the contrary, its intention and its effect were to provide for an exclusively baronial

body in which no "favorite" or "evil counselor" would be permitted to sit.

The conclusion of the whole matter, then, is that Magna Carta was a baronial document, a piece of class legislation. It was a list of concessions to the tenants *in capite* of the Crown for the conservation of the special privileges of their order. It was *not* a national Declaration of Independence. It did *not* contain any recognition of popular liberties. In fact, it was essentially a feudal pronouncement, and was applicable only to the conditions of a feudal State, such as England at the time was. Viewed in any other light, it is meaningless, unless its framers were also among the prophets, and were looking forward across some four centuries to the time when feudalism should have fallen into ruins, when monkish Latin should be neither spoken nor understood, and when every man should be not only free, but insistent upon the fact of his freedom.

Had Magna Carta, then, no value in the shaping of the British Constitution? Did it afford no assistance in the rise of free institutions? Those who imagine that because it did not provide all the constitutional safeguards which succeeding generations have read into it, therefore it has been of no constitutional value, are in error of the most serious character. There are at least two general respects in which Magna Carta has been of incalculable value in the process of setting up free institutions.

The first of these respects arises from the circumstances of the Charter's granting. As has been seen, it was imposed upon a reluctant King by a body of his subjects. It was thus a code of rules which the King must obey, would he, would he not. Hence Magna Carta initiated what modern Englishmen are so fond of referring to as the "reign of law." As Pollock puts it, "in brief, it (i. e. Magna Carta) means this, that the King is and shall be below the law" (1 Pollock & Maitland, Hist. of Eng. Law 173). In later times, when the feudal power of the baronage was broken, and the Crown, in Green's phrase, "towered aloft in solitary grandeur," this idea was literally the sole check upon royal absolutism. Magna Carta, then, was the first milestone on the long road leading to the ultimate firm establishment

of the supremacy of law in England. Up to that time, the King had been, both in theory and practice, the wielder of the law to suit his individual desires. The King gave the law, the King took it away; blessed be the name of the King. He was a despot, and his despotic right had in no respect been challenged. But Magna Carta was an unimpeachable record, attesting the fact that the Crown was no longer absolute. That was the rock upon which the constitutionalists of succeeding centuries were to found and build the structure of Anglo-Saxon liberty.

But the greatest constitutional value of the Charter has lain not in its construction, but in its misconstruction, not in what it really meant, but in what people thought it meant centuries later. Jenks (Hist. of Eng. Law) and McKechnie (Magna Carta) contend that, since it was essentially a feudal and reactionary document, it must therefore have been an actual hindrance to constitutional progress. Now these learned gentlemen are lawyers; they know what Magna Carta meant, and what the intention of its framers was; they are accustomed to seeing a law administered in accordance with the intention of the legislature which enacted it. But they forget that the transcendent period of the influence of Magna Carta was not the thirteenth century, but the seventeenth, and that it was then administered by people who did *not* know what it meant.

Feudalism was now a bygone system. The Renaissance had torn away the curtain of the Dark Ages, which had concealed Cicero, Virgil and Livy from the sight of men, and Latin was classical once more. *Auxilium*, *liber*, and *pares* had their vague classical significations instead of their exact monkish ones, and into that vagueness men read such meanings as were dictated by their political aspirations. The old English kingship with its tradition of absolutism was tottering to its fall, nor all the craft of James nor all the stubbornness of Charles could avail to save it. England was in a ferment; on every hand could be heard revolutionary political theories, and Magna Carta was cited as authority for them all. Shakespeare never heard of Magna Carta, but a half-century later there was hardly a village blacksmith but would interpret it with fervor. As Macy says (Eng. Const. 164): "It is the indefiniteness of some of the terms used, and

especially the indefiniteness of some of the classes to which the terms refer, that has made it easy to read into Magna Carta all the ideal principles of government which have been discovered in the succeeding centuries * * *. Hence Magna Carta, being in its origin a charter of privileges, has become the Great Charter of Liberties."

It is hardly possible for the modern observer to realize the reverence with which seventeenth century political reformers regarded the Charter, or the universality of application with which they invested it. It was appealed to in practically every political discussion of that fevered period, and there is hardly a document of constitutional importance but contains a reference to it. John Hampden refused to pay "ship-money," and, when prosecuted, pleaded Magna Carta, saying that "ship-money" was an *auxilium*, and since Parliament had not consented to it, the King could not legally levy it (2 Rushworth, Parl. Hist. 481). Sir Walter Erle refused to lend the King money, and for his temerity was ordered to be imprisoned without trial during the King's pleasure. In the *habeas corpus* proceedings which followed, his counsel said: "By the statute (sic) of Magna Carta—that statute, if it were fully executed as it ought to be, every man would enjoy his liberty better than he doth—it appears, *nullus liber, etc.*" He then complains that the careful Sir Walter has not been given a trial by jury, as thus guarantied. (3 State Trials 121.) Parliament invokes Magna Carta in the Petition of Right: "Whereas no man shall be forejudged of life or limb against the form of the Great Charter, * * * they (i. e. Parliament) do humbly pray that no freeman, etc." (3 Car. I, cap. 1.) When Parliament decided to abolish Star Chamber, they cited Magna Carta: "Whereas by the Great Charter many times confirmed, it is enacted that no freeman, etc. * * * therefore be it enacted that the said Court be clearly and absolutely dissolved" (17 Car. I., cap. 10). This last, by the way, is a pretty example of the irony of fate, for Star Chamber was what was left of the old *curia regis*, and here is the very document which had been intended to protect the *curia regis*, cited as authority for its destruction.

No further examples need be given, though they could be multiplied indefinitely, to show the immense influence exerted by Magna Carta during the period of the Puritan Revolution. Everywhere was Magna Carta, Magna Carta. Men exalted it into a document of blood and fire. In defense of its principles, they marched the length and breadth of England in the ranks of Fairfax and Cromwell. They died for it at Naseby, Marston Moor and Worcester. In the end, they sacrificed their King to it.

So the conclusion is that though Magna Carta did not mean trial by jury, nor representative government, nor taxation only by popular consent, at the time it was granted, it means all these things now, and has meant them for three centuries. By its very misconstruction, it has put forth a power in shaping the destinies of a great race beyond that of any other document ever penned.

William A. Stuart.

UNIVERSITY, VA.